Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA,

Petitioner,

v.

SOUTHEASTERN EXPRESS SYSTEMS, GEORGE BARNES, KEVIN CLARK, and GERRY WAMBOLT,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Georgia insurer having no contacts with California issued to Georgia residents an insurance policy containing a "nationwide" coverage clause, potentially affording the insureds a defense in any state. When the insurer reserved its rights with respect to any duty to defend or indemnify the insureds against a pending lawsuit in California, it was sued for breach of contract and insurance bad faith in the forum. The questions presented are:

1. Is the mere presumption that a nonresident insurer issuing a nationwide liability policy obtains benefit from the economic market of every state constitutionally sufficient to render personal jurisdiction over the insurer in a given forum?

2. Is it constitutionally permissible for a California court to premise jurisdiction upon an inference that a nonresident insurer which has issued a nationwide policy anticipates being sued in any forum in which its insureds do business, and in which they may be sued?

3. Does a nonresident insurer's presumed awareness of its insureds' forum-related activities establish sufficient minimum contacts between the insurer and the State of California to permit a California court to exercise personal jurisdiction over the insurer?

4. Is the requisite interest of the forum met by the determination that California has a significant interest in adjudication of bad faith disputes between nonresidents?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the Court of Appeal of the State of California are set forth in the caption, as follows: Southeastern Express Systems, a Georgia partnership; George Barnes; Kevin Clark; Gerry Wambolt; and Southern Guaranty Insurance Company of Georgia, a Georgia corporation ("Southern Guaranty".)[1]

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[1] Corporate Disclosure Statement: Petitioner, Southern Guaranty Insurance Company of Georgia is a wholly-owned subsidiary of Southern Guaranty Insurance Company, which in turn is a wholly-owned subsidiary of Winterthur U.S. Holdings, Inc. Winterthur U.S. Holdings, Inc. is itself wholly-owned by Winterthur Swiss Insurance Group, Winterthur, Switzerland. Petitioner and its affiliates do not issue shares to the public.

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Petitioner SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA hereby respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California, review of which was denied by the California Supreme Court on July 20, 1995.

Reference to Official and Unofficial Reports

The opinion of the California Court of Appeal, First Appellate District is reported at *Southeastern Express Systems v. Southern Guaranty Insurance Co. of Georgia*, 34 Cal.App.4th 1, 40 Cal.Rptr.2d 216 (1995). A copy of the Slip Opinion is appended hereto as Appendix A ("App. A".)

Statement of Jurisdiction by the United States Supreme Court

The decision of the Court of Appeal of the State of California was reported at 34 Cal.App.4th 1, 40 Cal.Rptr.2d 216 (1995). The Court of Appeal's order denying rehearing was filed May 18, 1995 and is appended hereto as Appendix B ("App. B"). The California Supreme Court's order denying petitioner's Petition for Review was filed July 20, 1995 and is appended to this petition as Appendix C ("App. C").

This Court is vested with jurisdiction to review this matter pursuant to 28 U.S.C. section 1257(3).

Text of Pertinent Constitutional Provisions, Statutes, Ordinances and Regulations

California Code of Civil Procedure section 410.10:

§ 410.10. Defined.

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

Amendment XIV, Section 1, United States Constitution:

Section 1. Citizens of the United States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Underlying Insurance Dispute

1. Petitioner Southern Guaranty

Petitioner Southern Guaranty is a Georgia insurance company, having its principal place of business in the State of Georgia.[2] It maintains no physical presence in

[2] Unless indicated by citations to the record below or supported by those documents contained in Appendix D-F, the facts

California in the form of offices, property, or bank accounts. As a Georgia insurer, Southern Guaranty is not authorized to do business in California, and has no agent for service of process in the State. (App. E2, at ¶¶ D, I.) It neither solicits nor issues insurance policies in California, and has not previously defended any insured – or an action brought by an insured against itself – within the State. (App. F2, at ¶¶ E-F.)

2. The Georgia Insurance Contracts

Southern Guaranty issued successive comprehensive liability insurance policies in the State of Georgia to George Barnes dba Southeastern Brokerage Co., an individual; and to Southeastern Express Systems, Inc., a Georgia partnership. Coverage was limited to bodily injury, property damage, personal injury, or advertising injury to which the insurance applied. With respect to advertising injury, the policies contained a "territory of coverage" clause whereby such coverage was extended for covered offenses committed in the "coverage territory." The "coverage territory" was defined to encompass "[t]he United States of America (including its territories and possessions), Puerto Rico and Canada. . . . " The declarations pages pertaining to these policies identified the insureds' type of business as "computer sales." (JA 44-47.)

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set forth below are reflected in the Court of Appeal's opinion appended hereto as Appendix A. The Joint Appendix which comprised the record below is hereinafter referred to as "JA".

3. The Underlying Action

In April 1992, Southeastern Express, Inc., a Georgia corporation, and Georgia resident George Barnes were sued in the United States District Court for the Northern District of California in an action entitled "Triad Systems Corporation v. Southeastern Express, Inc., et al." (United States District Court for the Northern District of California, Action No. C92 1539 FMS.) A second amended complaint filed October 5, 1992 named the following additional defendants: Southeastern Express Company doing business as Southeastern Brokerage Company; Southeastern Express Systems, Inc.; Kevin Clark, and Gerry Wambolt. (JA 102-121.) That action asserted claims for copyright infringement and unfair trade practices, amongst others, stemming from the defendants' alleged unauthorized copying and use of Triad Systems Corporation's software and related manuals.

B. The California Bad Faith Complaint

When Southern Guaranty reserved its rights with respect to any defense or indemnity obligation concerning the federal suit, Southeastern Express Systems, George Barnes, Kevin Clark, and Gerry Wambolt (hereinafter collectively referred to as "Southeastern Express") filed this action in the Superior Court of the State of California, City and County of San Francisco. The action alleged breach of contract and insurance bad faith, seeking recovery of defense costs and extracontractual damages on behalf of Southeastern Express. (App. D.)

C. The Related Georgia Action

On June 9, 1994, Southern Guaranty itself filed a declaratory relief action in the State of Georgia seeking to determine its insurance obligations as respects the "Triad Systems Corporation v. Southeastern Express, et al." action. (*Southern Guaranty Insurance Co. of Georgia v. Southeastern Express Systems, Inc.*, No. 94CV05311 (Ga., Bibb County Ct., filed June 9, 1994.) (App. G.)[3]

D. The Motion to Quash

Southern Guaranty challenged the power of the California superior court to exercise jurisdiction over it by its motion to quash service of summons. By this motion, Southern Guaranty maintained that an exercise of personal jurisdiction pursuant to California's long-arm statute, California Code of Civil Procedure section 410.10, would constitute a violation of due process under the Fourteenth Amendment of the United States Constitution. Alternatively, the Georgia insurer moved to dismiss the action on grounds of forum non conveniens.

The superior court granted the motion to quash and dismissed the action; the court declined to rule on the motion for forum non conveniens, deeming the matter moot.

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[3] Southeastern Express requested that judicial notice of this complaint be taken below. (JA 102-103.) Judicial notice of the Georgia complaint is hereby requested pursuant to Federal Rule of Evidence 201(b).

1. California Court of Appeal Decision and Petitions for Rehearing and Review

Southeastern Express appealed from the judgment of dismissal. The Court of Appeal reversed, concluding that Southern Guaranty had purposefully directed conduct toward the State of California by contracting to provide coverage for its insureds in any state. (App. A13-A14.) It also concluded that Southern Guaranty had obtained benefit from the economic market of all states, including California, by having sold and collected insurance premiums calculated upon a provision of nationwide coverage. (App. A6.) The court further opined that it would not be unreasonable for a California court to exercise jurisdiction over the Georgia insurer. (App. A6-A7.) Accordingly, the court concluded that the Due Process Clause of the Fourteenth Amendment would not be offended by this exercise of jurisdiction. (App. A13-A14.)

Southern Guaranty's petition for rehearing in the Court of Appeal, and petition for review to the Supreme Court of the State of California were summarily denied in turn. (App. B and App. C.)

Following denial of Southern Guaranty's petition for review, Southern Guaranty timely petitions this Court for certiorari.[4]

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[4] Southern Guaranty has moved alternatively to stay further proceedings in this action pending resolution of this petition or to stay or dismiss the matter on grounds of forum non conveniens and shall advise this Court of the resolution of those motions.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

The due process issue presented by this case arises in the manner in which the California Court of Appeal exercised personal jurisdiction over a nonresident insurer having no contacts with the state of California. The California court extended jurisdiction on the basis of a nationwide "territory of coverage" clause in an insurance contract entered between a Georgia insurer and its Georgia insureds. In premising jurisdiction on this contractual provision, the court engaged in an unwarranted extension of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny.

In permitting the *insureds'* forum-related activities to dictate its conclusion that Southern Guaranty had purposefully availed itself of the benefits of the forum state, the court returned to abandoned principles of foreseeability. Moreover, it premised its exercise of jurisdiction not on the insurer's *purposeful* contacts with the forum, but rather, on what an insurer in its position *should have known*. Furthermore, the court inferred sufficient minimum contacts from economic benefit in the state presumed to have inured from the insurer's provision of "nationwide" coverage, as well as from the insurer's presumed awareness of the insureds' activities directed to the forum state. Finally, the court overstated the forum's negligible interest in adjudicating this dispute between nonresidents.

In reversing the lower court, the California Court of Appeal concluded that a nonresident insurer with no

contacts with the forum could be susceptible to jurisdiction based upon its issuance of a policy potentially requiring it to defend its insured in any state. The court surmised that an insurer who contracted to provide such coverage knew that its insured was doing business in the forum state, and that the insurer was likewise aware it might be sued by its insured in that forum.

A writ of certiorari should be granted in this instance because the California Court of Appeal has decided a federal question in a manner which conflicts with prior decisions of this Court, as well as the decisions of other states and the Ninth Circuit Court of Appeals. Where not directly at odds with this Court's decisions, the California Court of Appeal's decision presents a significant constitutional issue which should be settled by this Court. This case offers a means by which this Court can provide much-needed guidance regarding the appropriate exercise of jurisdiction over nonresident insurance companies. Southern Guaranty respectfully urges this Court to exercise its power to grant certiorari in this instance.

II.

THE CALIFORNIA COURT OF APPEAL'S DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT

A. *International Shoe* and Its Progeny

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), this Court held that the Due Process clause of the United States Constitution "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state

has no contacts, ties, or relations." (*International Shoe*, 326 U.S. 310, at 319.) A state may exercise jurisdiction over an absent defendant only if the party has "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " (*Id.*, at 316.)

In *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), the Court determined that such minimum contacts were met through a nonresident insurer's issuance of a single insurance policy having "substantial connection" with the forum state. (*McGee*, 355 U.S. 220, at 223.) That connection was established through evidence that the contract had been delivered in California, and premiums mailed from California by an insured who was a resident of the state. (*Id.*) In further deference to the insured's resident status, the Court concluded that California had a "manifest interest" in providing its citizens a meaningful forum for adjudication of insurance disputes. (*Id.*)

Not long thereafter, this Court had the opportunity to revisit the *McGee* decision in *Hanson v. Denckla*, 357 U.S. 235 (1958). In that case, the Court distinguished an insurance policy solicited in the forum state from a contract having no connection with the forum in its inception. (*Hanson*, 357 U.S. 235, at 252.) The trust agreement in question was executed in Delaware by a Delaware trust company and settlor domiciled in Pennsylvania. Although various acts of trust administration were performed in Florida, none were deemed akin to solicitation of the contract in *McGee*, *supra*. Noting that the "agreement was entered without any connection with the forum State" of Florida, the Court concluded that the action

could not be characterized as "one to enforce an obligation that arose from a privilege the defendant exercised in Florida." (*Id.*)

In the years since *McGee* and *Hanson*, this Court has had rare occasion to examine the issue of minimum contacts based upon contractual dealings.[5] Instead, the Court has confronted the issue of personal jurisdiction principally in the context of litigation stemming from the distribution of products to distant forums. While acknowledging that the advent of modern communications has prompted relaxation in the limits imposed by the Due Process Clause, these cases have nonetheless adhered to principles of interstate federalism in restricting each state's ability to exercise jurisdiction over nonresident corporations.

In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), this Court reaffirmed that a court's exercise of jurisdiction over a nonresident corporation is dictated foremost by the territorial limitations of the Due Process Clause. Renouncing a line of decisions that had premised jurisdiction on principles of foreseeability, the Court rejected an exercise of jurisdiction over a nonresident automobile distributor based upon use of a single vehicle in the forum state. (*World-Wide Volkswagen*, 444 U.S. 286, 295-296.) The Court emphasized it was not the mere likelihood that the product would find its way into the

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[5] See generally, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) [defendant subject to jurisdiction in Florida by acceptance of Florida franchise and Florida's regulation of business, and agreement to choice-of-law provision in contract favoring Florida.]

forum that was relevant, but "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." (*Id.*, at 297.)

Since *World-Wide Volkswagen, supra,* this Court has consistently stated that foreseeability of an injury or event in another state cannot serve as a "sufficient benchmark" for exercising personal jurisdiction over a nonresident defendant. (See, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, at 474 (1985); see also, *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, at 108-109 (1987).) In *Asahi, supra,* Justice O'Connor, joined by Justices Powell and Scalia, concluded that the mere awareness that a product could be swept into the forum state on the "stream of commerce," could not subject a manufacturer to jurisdiction in the forum, absent additional conduct directed to the forum state. (*Asahi,* 480 U.S. 102, at 112-113.)

B. The Court of Appeal's Finding of Minimum Contacts Based Upon Presumed Economic Benefit in the Forum is in Conflict With the Decisions of This Court

As a principal basis for its determination that Southern Guaranty possessed sufficient minimum contacts to justify an exercise of jurisdiction, the California Court of Appeal opined that Southern Guaranty "sold its policy as one providing nationwide coverage and collected insurance premiums calculated upon that broad coverage, thus deriving benefit from the economic market of all states in

which [the insureds] faced potential business liability, including California." (App. A6.)

The record, however, was devoid of any evidence of Southern Guaranty's calculation of premiums based upon such provision of nationwide coverage. (JA 42-43, 83-91, 93-94, 96-100, 278-279.) The Court of Appeal's decision is thus rooted in a *presumption* that Southern Guaranty derived "benefit from the economic market of all states" in which its insureds might be sued. (App. A6.)

The source of the Court of Appeal's "economic market" test was this Court's recent decision in *Quill Corporation v. North Dakota By and Through Heitkamp*, 504 U.S. 298 (1992). In *Quill*, the Court examined whether the Due Process and Commerce Clauses barred enforcement of a use tax against an out-of-state mail-order house. In addressing the question of due process, the Court noted that in the context of personal jurisdiction, it had increasingly abandoned mechanical tests dependent upon a nonresident corporation's "presence" in the forum:

> Applying these principles, we have held that if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's in personam jurisdiction even if it has no physical presence in the State. (*Quill*, 504 U.S. 298, at 307.)

In support of this statement, the *Quill* Court cited its earlier decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), which had held that a nonresident's physical presence in the forum was not an essential predicate to jurisdiction, where "a substantial amount of business is transacted solely by mail and wire communications

across state lines. . . . " (*Quill*, 504 U.S. 298, at 307-308, quoting *Burger King*, 471 U.S. 462, at 476 (1985).) In keeping with that expression of jurisdiction, the *Quill* Court concluded that due process requirements were met by the mail-order house's "continuous and widespread solicitation" of resident customers through catalogs and flyers directed to the forum state. (*Id.*, at 308.)[6]

Unlike the nonresident in *Quill*, Southern Guaranty solicited no business in California and issued no insurance policies to California residents. The sole policy at issue was sold and issued in the State of Georgia. Hence the California Court of Appeal erroneously equated *presumed* collateral economic benefit to Southern Guaranty with the active business solicitation of forum residents present in *Quill*.

The Court of Appeal's finding of jurisdiction premised upon a mere presumption of economic benefit conflicts with this Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

In that case, the Court rejected the notion that minimum contacts were satisfied because the purchase of automobiles in New York – from which the distributor earned "substantial revenue" – would not have occurred but for the fact that the vehicles were capable of use in distant forums. (*World-Wide Volkswagen*, 444 U.S. 286, at 298.) The Court held that "financial benefits accruing to

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[6] The Court ultimately held that the Commerce Clause, Art. I, § 8, cl. 3 barred enforcement of North Dakota's use tax against the out-of-state mail-order business. (*Quill*, 504 U.S. 298, at 309-318.)

the defendant from a collateral relation to the forum state will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State." (*Id.*, at 299.) In the Court's view, the fact that the nonresident defendant may have obtained marginal revenue from products used in the forum state was "too attenuated a contact" to support jurisdiction there. (*Id.*)

The argument rejected by the *World-Wide Volkswagen* Court is analogous to the California Court of Appeal's conclusion that because the coverage afforded by the insurance policy was potentially applicable in California, Southern Guaranty must have obtained premiums attributable to the mobile nature of that coverage. As noted, there was no evidence of record that premiums were calculated or collected on that basis. Accordingly, the court's conclusion was grounded in speculation regarding the conduct of the insurer's business.

Southern Guaranty respectfully submits that an exercise of jurisdiction based upon a court's mere supposition of economic benefit derived from the forum state is an affront to due process. Even assuming that Southern Guaranty obtained marginal revenue from the fact that its coverage potentially extended to the forum, *World-Wide Volkswagen* establishes that such attenuated economic benefit is insufficient to establish the requisite minimum contacts. (*World-Wide Volkswagen*, 444 U.S. 286, at 299.)

C. The Court of Appeal's Decision is in Conflict with the Decisions of This Court Which Have Rejected the Unilateral Activity of Others as a Basis for Jurisdiction Over a Nonresident

The decision of the California Court of Appeal, moreover, placed undue emphasis on the *plaintiffs'* California business activities as a basis for jurisdiction over Southern Guaranty, in contravention of the decisions of this Court.

In *World-Wide Volkswagen, supra,* this Court stressed that an exercise of jurisdiction over a nonresident defendant cannot be based upon the plaintiff's unilateral business activity in the forum.[7] (*World-Wide Volkswagen,* 444 U.S. 286, 297-298.) Rather, the proper focus is upon the *defendant's* conduct directed to the forum state. (*Id.*) Only where a nonresident corporation has itself purposefully conducted activities in the forum, does "it [have] clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation. . . . " (*World-Wide Volkswagen,* 444 U.S. 286, at 297.)

In the area of insurance disputes, some courts have deemed an insurer's actual knowledge of its insured's business activity within the forum sufficient in itself to render the insurer amenable to suit in that state. These cases have primarily involved nonresident insurers who knowingly insured manufacturers of widely-distributed products, and are therefore distinguishable on that basis.

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[7] See also, *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, at 417 (1984).

In *American & Foreign Insurance Association v. Commercial Insurance Co.*, 575 F.2d 980, 981-982 (1st Cir. 1978), the First Circuit Court of Appeals found a Colombian insurer subject to jurisdiction in Puerto Rico. The insured, a Colombian manufacturer of glass bottles, shipped a large quantity of bottles to Puerto Rico. One bottle exploded there, giving rise to an action in the forum. The appeal arose from a default judgment entered against the insurer and its insured. (*American & Foreign*, 575 F.2d 980, 981.)

Noting that the terms of the Colombian policy "assured full knowledge of both the volume of export sales as well as the actual location of the customers," the court concluded that because the insurer had endeavored to insure a "substantial subject of insurance in Puerto Rico" – the insured's bottles – the insurer was thus amenable to suit in the forum. (*American & Foreign*, 575 F.2d 980, 982.) The court also noted that Puerto Rico had an important interest in protecting the rights of its residents who were injured by the product insured. (*Id.*)

The Court of Appeals for the District of Columbia Circuit adopted a similar approach in *Eli Lilly and Co. v. Home Insurance Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert. denied, Falcon Insurance Co. v. Eli Lilly and Co.*, 479 U.S. 1060 (1987), *cert. denied, Home Insurance Co. v. Eli Lilly and Co.*, 479 U.S. 1060 (1987). The question presented was whether nonresident excess insurers could be haled into the District of Columbia court in an impleader action stemming from a products liability suit against the insured. Observing that the insurers knew that the insured distributed its products nationwide, the Court reasoned that they were also aware that the insured could be sued in any state, and that they might in turn be

subject to an impleader action in that forum. (*Eli Lilly and Co.*, 794 F.2d 710, 720.)

In this instance, the California Court of Appeal went one step further than the *American & Foreign* and *Eli Lilly and Co.* courts in presuming both the scope of the insureds' California business activities, and Southern Guaranty's knowledge of those activities. Although the California Court of Appeal concluded that the plaintiffs "operate an interstate business with significant activities here" (App. A13) – and that "insurers of interstate businesses should reasonably anticipate being called into foreign forums" (App. A11) – the record failed to document the extent of Southeastern Express' business activities in California. Moreover, there was no evidence of record that Southern Guaranty *knew* the Georgia individual and partnership it insured were conducting business of an interstate nature.[8] Nor was there evidence that Southern Guaranty knew specifically that they were conducting that business in California. Under the Court of Appeal's decision, then, any insurer with a nationwide coverage clause must be subject to personal jurisdiction in any forum in which its insured is sued – regardless of the insurer's actual knowledge of the insured's specific forum-related activity, and regardless of the absence of the insurer's own contacts with the forum.

The constitutional prerequisite of "purposeful availment" ensures, however, that nonresidents have notice

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[8] Southeastern Express Systems general partner George A. Barnes claimed to have advised his insurance broker to that affect (JA 84-85), however, the broker did not so attest in opposition to the motion to quash (JA 93-94).

that their own interstate activities may subject them to suit in a distant forum. (*World-Wide Volkswagen*, 444 U.S. 286, at 297 (1980).) The result achieved by the California Court of Appeal is tantamount to compelling a nonresident insurer to defend itself in a particular forum based upon the unilateral activities of the plaintiff. As demonstrated, this decision seriously conflicts with the prior decisions of this Court.

D. The Court of Appeal's Decision is in Conflict With Decisions of this Court in Its Resolution of Those Factors Which Govern Whether an Exercise of Jurisdiction Would Be Unreasonable

1. The Court of Appeal's Decision Overstates California's Interest in Adjudicating this Dispute

Even where minimum contacts are present, the Due Process Clause prohibits an exercise of jurisdiction under circumstances that would offend "'traditional notions of fair play and substantial justice.' " (*International Shoe Co. v. Washington*, 326 U.S. 310, at 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, at 463 (1940).)

Consideration of the following factors determines whether an exercise of jurisdiction is reasonable:

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.' (*Asahi*

Metal Industry Co. v. Superior Court, 480 U.S. 102, at 113 (1987).)

The California Court of Appeal held that it was "neither unreasonable nor unfair to require an insurer who has assumed the responsibility of defending its insured in California to defend itself when it refuses its insured's defense in a suit brought in California." (App. A6.) The court's resolution of the foregoing relevant considerations was plainly erroneous.

Foremost in the Court of Appeal's determination that an exercise of jurisdiction was reasonable was its belief that California possessed an overriding interest in resolving this dispute between nonresidents.[9] Having found Southern Guaranty's contacts with California sufficient, the Court of Appeal promptly concluded that California had a "significant interest in assuring that injuries and losses suffered in the state are afforded insurance coverage." (App. A7.) In addition, the Court of Appeal found that California had a collateral interest in "encouraging fair claims handling practices and holding insurers answerable for bad faith practices." (App. A7.)

In *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), the Supreme Court acknowledged that California had an "manifest interest" in providing a forum for resolution of disputes involving *resident* insureds. (*McGee*, 355 U.S. 220, at 223.) The Court's recognition of that

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[9] This Court, however, has emphasized that while the interest of the forum state is of consideration, the central inquiry is whether the "quality and nature" of the nonresident's activity is such that it should be compelled to defend itself in the forum. (*Kulko v. California Superior Court*, 436 U.S. 84, at 92 (1978).)

interest was grounded in the inherent unfairness in requiring a resident to seek redress in a foreign forum. (*Id.*, at 223-224.) In the case of a *nonresident* plaintiff, however, this Court found California's legitimate interest in adjudicating disputes between nonresidents to be "considerably diminished." (*Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, at 114 (1987).)

The Court of Appeal's determination that nonresidents such as Southeastern Express should be afforded a California forum for resolution of insurance disputes is in apparent conflict with this Court's decision in *Asahi.*[10] Moreover, to the extent that *McGee* and *Asahi* are themselves incongruous, or fail to settle the issue presented here, Southern Guaranty respectfully submits that this Court should grant certiorari to resolve this question impacting insurance disputes between nonresidents.

Moreover, the significance of California's "collateral interest" in providing a forum for nonresidents seeking reimbursement of defense costs and correlative bad faith damages – benefits which would flow entirely to the nonresident insured – is also called into question by this Court's decision in *Asahi, supra.* No case has previously

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[10] This result was also substantially in conflict with the decisions of other California courts that had found California to have minimal interest in insurance disputes between nonresident insurers and nonresident insureds. (See e.g., *Zimmerman v. Allstate Insurance Co.*, 179 Cal.App.3d 840, 224 Cal.Rptr. 917 (1986) [no interest in deterrent effect of bad faith cause of action upon conduct in Georgia]; *Great-West Life Assurance Co. v. Guarantee Co. of North America*, 205 Cal.App.3d 199, 252 Cal.Rptr. 363 (1988) [interest in dispute between nonresident insurers diminished where plaintiff is not a California resident].)

held that California has any controlling interest in whether a nonresident insured is afforded a defense within the State. *Asahi, supra,* therefore suggests that California's interest in adjudicating a bad faith dispute arising solely between nonresidents should not be used to support the reasonableness of an exercise of jurisdiction.

2. The Court of Appeal's Decision Erroneously Concludes That Any Inconvenience in Adjudicating This Dispute in California did not Preclude an Exercise of Jurisdiction

To the extent that the Court of Appeal's decision failed to weigh the important consideration of convenience to the litigants against an exercise of jurisdiction, the court's decision was inconsistent with this Court's rulings.

As this Court stated in *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102 (1987), the correlative burden upon the defendant in being forced to litigate in a distant forum merits due consideration. (*Asahi,* 480 U.S. 102, at 113-114.) In finding an exercise of jurisdiction over a foreign corporation to be unreasonable, the *Asahi* Court concluded that the plaintiff had failed to demonstrate that it would be *more* convenient to litigate its claim against the nonresident corporation in California, as opposed to in Taiwan or Japan. (*Id.,* at 114.) This and other factors, including the State's minimal interest in adjudicating the dispute, led the Court to conclude that an exercise of jurisdiction would be unreasonable. (*Id.,* at 114-115.)

Here, the California Court of Appeal conceded that "[t]here may be no greater efficiency in resolving this bad faith insurance action in California . . . although this record fails to demonstrate that the efficiency is markedly less." (App. A8.) Accordingly, as in *Asahi, supra,* the record failed to reflect that it was *more* convenient to adjudicate this dispute in California. This consideration should thus have balanced in favor of a finding that an exercise of jurisdiction was unreasonable.

3. The Court of Appeal's Decision Erroneously Concludes that the Shared Interests of California and Georgia Compel an Exercise of Jurisdiction

Although acknowledging that it would be no more efficient to resolve the dispute in California, the Court of Appeal further concluded that California and Georgia had a "shared interest in full and fair indemnification and defense of insured losses [which] would be hindered were [the California court] to categorically deny an insured a local forum to dispute its insurer's refusal to defend an action pending in the state." (App. A8.)

The court's analysis is simply incorrect. In this instance, no frustration of the shared interests of Georgia and California would result from an absence of jurisdiction in California. A parallel action is proceeding in Georgia, thus assuring an alternative forum for resolution of this very dispute. (App. G.) That action will adjudicate the issues of Southeastern Express' entitlement to defense

costs and bad faith damages. Denial of a "local [California] forum" would in no way hinder the shared interests of the states in fair resolution of such insurance disputes.

III.

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS IN CONFLICT WITH DECISIONS OF OTHER STATE COURTS AND THE NINTH CIRCUIT COURT OF APPEALS

A. The Court of Appeal's Decision is in Conflict With Those States That Have Declined to Exercise Jurisdiction on the Basis of a Nationwide Coverage Clause

The California Court of Appeal's decision in this case is contrary to several decisions of the highest courts of other states which have declined to exercise jurisdiction on the basis of a nationwide coverage clause.

The Arizona Supreme Court plainly rejected the rationale employed here. In *Batton v. Tennessee Farmers Mutual Insurance Co.*, 153 Ariz. 268, 736 P.2d 2 (1987), the nonresident defendant was a Tennessee automobile insurer. The insured was not a resident of Arizona, and the Tennessee insurer had never engaged in business in the forum. (*Batton*, 153 Ariz. 268, 269-270, 736 P.2d 2, 3-4 (1987).) The Court declined to exercise jurisdiction over a breach of contract and bad faith action arising from an automobile accident in Arizona, based solely upon the insurer's issuance of a nationwide policy:

> Issuing an insurance policy providing nationwide coverage is no different than selling a product, such as a car, with a warranty that it is

> fit for its intended use and with the knowledge that it may be used nationwide. *World-Wide Volkswagen* establishes that jurisdiction is improper in either case. (*Batton v. Tennessee Farmers Mutual Insurance Co.*, 153 Ariz. 268, at 272, 736 P.2d 2, at 6.)

The court concluded that the Tennessee insurer did nothing to purposefully avail itself of the Arizona forum. It emphasized that no evidence in the record allowed the court "to infer that [the insurer] conducted its business knowing that it was regularly coming into contact with Arizona." (*Batton*, 153 Ariz. 268, at 272, 736 P.2d 2, at 7.) Consequently, the court declined to exercise jurisdiction over the nonresident carrier.[11]

Similarly absent from the record here is evidence that Southern Guaranty had conducted business knowing it was coming into contact with California. Southern Guaranty issued policies solely to Georgia businesses. It had never been called upon to defend Southeastern Express or any other insured in California. (App. F2, ¶ E.) Insofar as the Court of Appeal found jurisdiction based upon a *presumption* that Southern Guaranty was knowingly directing conduct toward the forum, the court's decision presents an unwarranted extension of *International Shoe, supra*.

The decision of the California Court of Appeal is also inconsistent with the Florida Supreme Court's decision in

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[11] But cf. *Jarstad v. National Farmers Union Property and Casualty Co.*, 92 Nev. 380, 552 P.2d 49 (1976); *Szalay v. Handcock*, 307 Ark. 232, 819 S.W.2d 684 (1991) [contrary result where underlying litigants were residents of the forum state.]

Meyer v. Auto Club Insurance Association, 492 So.2d 1314 (Fl. 1986). In *Meyer*, the Florida Supreme Court rejected the argument that the risk of a loss occurring in Florida was a foreseeable consequence of a Michigan insurer's having issued a policy with a nationwide coverage clause. The Court reasoned that the insurer had no contacts with Florida – the policy had been issued in Michigan, the insurer had no physical presence in Florida, and did not solicit business there – and thus, had no reasonable expectation of being subjected to defending a suit in Florida. (*Meyer*, 492 So.2d 1314, at 1316.)

Also in conflict with the California Court of Appeal's decision is *Waste Management, Inc., et al. v. Admiral Insurance Company*, 138 N.J. 106, 649 A.2d 379 (N.J. 1995), *cert. denied, WMX Technologies, Inc. v. Canadian General Insurance Co.*, 63 U.S.L.W. ___ (U.S. Feb. 21, 1995) (No. 94-987). In *Waste Management, supra*, the New Jersey Supreme Court held that a "territory of coverage" clause was alone insufficient to establish a basis for personal jurisdiction. (*Waste Management*, 138 N.J. 106, at 127-128, 649 A.2d 379, at 389.) While recognizing the trend toward an expansion of jurisdiction, and New Jersey's interest in regulating the field of insurance, the court emphasized that the threshold jurisdictional requirement must still be met: "[T]hat the *defendant* create minimum contacts with this state by purposefully availing itself of some benefit of doing business here." (*Id.*, at 138 N.J. 106, at 128, 649 A.2d 379, at 389.) As the Canadian insurers engaged in no activity within the forum, were not licensed in the state, and had ascertained that their insured did no business in the United States, the court concluded that the mere issuance of the nationwide policy could not compel their presence

in the New Jersey courts. (*Id.*, at 138 N.J. 106, at 128, 649 A.2d 379, at 390.)[12]

Here, the record likewise reflects that Southern Guaranty did no business in the forum state. Moreover, to the extent that the court merely assumed that the insurer must have been aware of its insureds' susceptibility to suit in a California forum, the Court of Appeal's decision is in conflict with New Jersey's resolution of that issue in *Waste Management, supra.*

Other jurisdictions which have addressed the issue, including Wisconsin and Louisiana, have concluded that a contract to defend an insured "in any state" does not connote an agreement to be sued in the state in a first

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[12] Recently, in contrast to New Jersey Court's decision in *Waste Management*, the Minnesota Supreme Court in *Domtar, Inc. v. Niagara Fire Insurance Co.*, 533 N.W.2d 25 (Minn. 1995) determined that a Canadian insurer who issued a policy with a coverage clause requiring it to respond to claims in the United States was subject to jurisdiction in Minnesota for cleanup costs. Citing *Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.*, 907 F.2d 911, 913 (9th Cir. 1990), the court noted that such cases had held that "the insurer *must know* of its insured's contact with the forum state before the court will conclude that the insurer purposefully established minimum contacts with the forum state." (*Domtar*, 533 N.W.2d 25, at 32-33 [Emphasis added].) In *Domtar*, the record reflected that the insurer's entire underwriting file would have contained extensive information regarding the insured's sales, the location of its operations, and its prior claims history. Based upon the information likely contained in the underwriting file, the court concluded that the insured "constructively knew" that the insured had formerly operated a manufacturing facility in Minnesota and might be requested to respond to requests to reimburse for clean-up costs. (*Id.*, at 33.)

party action by that insured, and thus fails to manifest a purposeful availment of the benefits of doing business in the forum. (See, *Marsh v. Farm Bureau Mutual Insurance Co.*, 179 Wis.2d 42, 505 N.W.2d 162 (Wis. App. 1993); *Hall v. Scott*, 416 So.2d 223 (La. App. 1982).) In *Marsh, supra*, the Wisconsin court concluded that an agreement to defend an insured within the forum could not be used as a springboard for jurisdiction:

> The contract was between a Minnesota resident and a business foreign to Wisconsin. The contract was sold and premiums were paid in Minnesota. The contract made a future lawsuit to defend [the insured] in Wisconsin a fore-seeable [sic], and highly likely event. However, an agreement to defend in Wisconsin does not imply an agreement to be sued by him in Wisconsin. The insurance contract does not evince a purposeful availment of the benefits of doing business in Wisconsin. The contract fails to support jurisdiction. (*Marsh*, 179 Wis.2d 42, at 55-56, 505 N.W.2d 162, at 167.)[13]

As demonstrated, in contrast to the California Court of Appeal, the highest courts of a number of states that have considered the issue have determined that a nationwide coverage clause alone may not render a nonresident insured susceptible to jurisdiction in the forum state. A grant of certiorari would serve to resolve this significant conflict amongst these several states.

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[13] The Wisconsin court likewise concluded that the state had only a "minimal interest" in resolving an insurance dispute between a Minnesota resident and an Iowa insurance company. (*Marsh*, 179 Wis.2d 42, at 58, 505 N.W.2d 162, at 168.)

B. The Court of Appeal's Decision is in Conflict With the Ninth Circuit Court of Appeals

There is also direct conflict between the California state appellate court and the Ninth Circuit Court of Appeals regarding the effect of a nationwide coverage clause upon California's exercise of jurisdiction over a nonresident insurer.[14]

In *Hunt v. Erie Insurance Exchange Group*, 728 F.2d 1244 (9th Cir. 1984), the Ninth Circuit held that a nonresident insurer's failure to have drafted an insurance policy so as to exclude the possibility of defending a suit wherever the injured claimant received medical care, did not constitute an act by which the insurer had purposefully availed itself of the privilege of conducting activities within the State of California. (728 F.2d 1244, 1247.) Moreover, the court concluded that the insurer had not purposefully availed itself of a benefit from the state in declining to pay benefits under the policy. (728 F.2d 1244, 1248.) Consequently, the insurer was not subject to jurisdiction, even when, as here, its policy potentially obligated it to defend within the forum.[15]

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[14] The magnitude of this particular conflict is underscored by the fact that a California federal court determines personal jurisdiction over a nonresident defendant in accordance with the law of the forum state. (*Hunt v. Erie Ins. Exchange Group*, 728 F.2d 1244, 1246 (9th Cir. 1984).)

[15] In contrast, the Ninth Circuit found a nonresident malpractice insurer amenable to jurisdiction within California where the insurer had purposefully directed its activities toward insuring *California* physicians. (See, *Haisten v. Grass Valley Medical Reimbursement*, 784 F.2d 1392 (9th Cir. 1986).)

In contrast, the California Court of Appeal determined that Southern Guaranty's issuance of a policy potentially obligating the Georgia insurer to defend its insured in any state rendered the insurer amenable to jurisdiction in California. (App. A.) In this regard, the *Hunt* case is substantially in conflict with the decision of this California Court of Appeal. This case presents this Court the opportunity to resolve the conflict which now exists between California state and federal courts concerning this important jurisdictional matter.

IV.

CONSIDERATION BY THIS COURT IS NECESSARY TO SETTLE THIS IMPORTANT QUESTION OF FEDERAL LAW

As the California Court of Appeal remarked in announcing its decision, the constitutional question presented by this case is narrow, yet important. The issue of personal jurisdiction over a nonresident defendant based entirely upon contractual dealings with another nonresident, is of paramount importance to all those who engage in modern commerce. The nonresident corporation must be fully apprised of the jurisdictional consequences of its contractual relationships with other nonresidents. As demonstrated by this petition, the question has arisen with increasing frequency in the area of insurance disputes, with conflicting results.

This case presents this Court the opportunity to formulate principles which courts may embrace in determining whether to exercise jurisdiction in insurance bad faith actions between nonresident defendants. It is vital that

insurers be alerted whether issuance of a liability policy containing a nationwide coverage clause will subject them to personal jurisdiction in any state. The divergence of opinions amongst state and federal courts suggests that this Court's prior decisions provide no clear guidance regarding resolution of this question. Southern Guaranty respectfully submits that consideration of this matter by this Court is warranted to settle this important constitutional issue.

CONCLUSION

Based upon the foregoing, petitioner Southern Guaranty Insurance Company of Georgia respectfully requests that this Court grant its petition for Certiorari.

Respectfully submitted,

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